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No. 82-556

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

PRESS-ENTERPRISE COMPANY,
a California Corporation,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

ALBERT GREENWOOD BROWN, JR.

Defendant.

BRIEF OF AMICUS CURIAE THE STATE OF CALIFORNIA

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INTEREST OF AMICUS CURIAE

The People of the State of California are the party plaintiffs in

all criminal actions prosecuted in California courts, and respondent on appeals from judgments of conviction rendered in those actions. The issues presented in this case are connected with jury selection in the case of The People of the State of California v. Albert Greenwood Brown, Jr. The defendant in that case was sentenced to death, and his automatic appeal is now pending before the Supreme Court of California.

It is of vital interest to the State of California that in all California criminal trials the right of each party to a fair trial is protected without infringing on the constitutionally protected rights of the press, the public in general or individual persons. The issues presented in this case involve a balancing of those rights.

SUMMARY OF ARGUMENT

This Court has recognized a First Amendment right of the general public and the press to have access to criminal trials. (Globe Newspaper Co. v. Superior Court (1982) ___ U.S. ___, 73 L.Ed.2d 248.) That right, however, is not absolute and must be weighed against other interests such as the right of the defendant and the People to a fair trial.

A trial court's decision to restrict public access must be articulated in findings which acknowledge the interests involved. The closure must take alternative solutions into consideration and be as limited as possible. Interested parties should be given a right to be heard.

This procedure for limited closure applies to jury selection in

criminal cases with consideration given to factors which affect obtaining a fair and impartial jury.

Where portions of a voir dire have been closed, transcripts of the proceedings should be made public when the reasons for closure no longer outweigh other interests.

In this case, the trial court's orders closing the majority of voir dire and denying public access to the transcripts were overbroad. Absent articulated findings on the record no justification is stated for denying public access to all of the transcript of the closed voir dire proceedings.

On the other hand, our partial review of the transcript of the closed voir dire proceedings gives rise to the belief there is a possibility that a limited closure was proper. In light of

that, amicus urges that the proper remedy is a remand to the trial court to order the entire transcript released, or as much of it as possible, excepting from release only such portions as where the trial court can provide articulated findings justifying closure.

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ARGUMENT

I

EXCLUSION OF THE PUBLIC FROM JURY SELECTION SHOULD BE LIMITED AND DETERMINED BY BALANCING THE INTERESTS INVOLVED

This Court's recent decisions in Globe Newspaper Co. v. Superior Court (1982) ___ U.S. ___, 73 L.Ed.2d 248, and Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555, have firmly established that the press and general public have a constitutional right of access to criminal trials. This right of access is embodied in the First Amendment and applied to the states through the Fourteenth Amendment. (Globe Newspaper Co. v. Superior Court,, supra, ___ U.S. ___, 73 L.Ed.2d at p. 255.)

Although this right of access to criminal trials is of constitutional

stature it is not absolute. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 257.)

In the present case the request for closure was made by a criminal defendant on the basis that opening the proceedings would interfere with his right to a fair trial. The question presented here, therefore, is how to decide which of these important rights should give way and what procedure should be used in reaching that determination.

In Gannet Co. v. DePasquale (1978) 443 U.S. 368, this Court, while not yet recognizing a First and Fourteenth Amendment right to attend criminal trials, assumed arguendo such a right existed. Under this assumption, it was held the trial court's weighing of the defendant's rights against the right of public

access was properly based on an assessment of the competing societal interests involved.[1] The ruling by the trial court was that the public could be excluded from the suppression hearing because an open proceeding would pose a reasonable probability of prejudice to the defendants. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 392-393.)

Although a criminal defendant has a Sixth Amendment right to a public trial there is no right to compel a private trial. (Id., at p. 382.) Thus,

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1. Trial courts now must recognize the constitutional right for the public or press to attend criminal trials and representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 259, n. 25; Richmond Newspapers, Inc. v. Virginia, supra, 448 U.S. at p. 581, (plurality opinion).)

the burden should be on a criminal defendant to show an open proceeding would pose a reasonable probability of prejudice to his right to a fair trial.

Given the importance of public trials, however, any closure should be as limited as possible while still protecting the defendant's rights. In addition to balancing the interests of the parties, the trial court must examine alternative solutions which would meet the need to ensure fairness.[2/] (Richmond Newspapers, Inc. v. Virginia, supra, 448 U.S. at pp. 580-581.)

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2. In addition to the interests of the defendant and the press or public, the interests of the state may also compel closure. Closure by the state is justified only when necessitated by a compelling governmental interest narrowly tailored to serve that interest. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 257.) In some situations it is possible the interests of the state may be added

A final requirement for closure of a criminal trial is articulated findings which are necessary for review.[3/]

In applying the general principle established by this Court to voir dire proceedings several other factors

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to the interests of the defendant, with those combined interests outweighing the public right to an open hearing.

3. Among the troubling procedural aspects of the present case is the fact the trial court's findings were never provided to the California Court of Appeal or the California Supreme Court when they were requested to review the closure. In addition, the petition for writ of mandate requesting opening of the voir dire was not filed until the conclusion of trial when the issue was moot on its face, and the request to order the trial court to release the transcript of the voir dire was filed in the California Court of Appeal although death penalty cases are appealed directly to the California Supreme Court. (Cal. Const., art. 6, § 11.) For the above reasons the denial of the petition for writ of mandate and the refusal of the California Supreme Court to hear the matter, both without opinion, may have been based entirely on state procedural grounds.

require consideration in the balancing process. There is some question as to whether the logic of Globe setting forth reasons for open trials applies to voir dire proceedings. In United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, it was held voir dire is a part of trial and governed by Globe. This holding is not challenged herein. However, to the extent a weighing or balancing process is involved, the right of the public or press to attend voir dire proceedings would be of somewhat less importance than the right to attend the evidentiary portion of the trial. It should also be noted that unlike the adversary method of determining the truth through direct and cross-examination of witnesses at

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trial[4] both parties need to assure, if possible, that potential jurors are both truthful and candid in their responses to questions. As such the atmosphere during voir dire should be conducive to facilitating this need.

An example of a reasonable limited closure of voir dire could take place in a rape case. A potential juror might hesitate to acknowledge to counsel that she or her minor child had previously been sexually assaulted if this fact, hitherto unrevealed were to be reported in the community newspaper. Obviously, questioning in this situation should be conducted in camera at the request of the juror. This Court has

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4. This Court has recognized that, as a general matter, openness in court proceedings may improve the quality of testimony. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 259, n. 26.)

acknowledged the traditional right of trial courts to conduct in camera conferences in the exercise of judicial discretion. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 259, n. 25.) Although this type of limited closure could be phrased in terms of protecting the juror's right to privacy it is more properly considered as another aspect of insuring a fair trial for both the defendant and the state.

Another type of situation when limited closure would be appropriate would be where the publicity from reporting voir dire might prejudice other potential jurors not yet cautioned to avoid reading about the proceedings. In California, when the death penalty is a possible punishment, voir dire is an extensive procedure. Counsel for the

defendant(s) are each allowed 26 peremptory challenges as opposed to 10 in a normal felony trial. In addition, voir dire of individual jurors is to be done individually and in sequestration. (Hovey v. Superior Court (1980) 28 Cal.3d 1.)[5/] This process resulted in a jury selection process of over six weeks in the present case and lengths of six months are not uncommon in other death penalty cases. As a practical matter the entire jury pool cannot be selected at one time in many instances. In these cases potential jurors might become prejudiced by continuing news

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5. Although Hovey requires jurors to be questioned individually and in sequestration there are no California cases that interpret this holding to require exclusion of the press or public from the proceedings. The record does not reflect the trial judge in the present case based his decision to close the voir dire of the jury on the authority of Hovey.

reports prior to being advised to avoid them. In small jurisdictions pretrial publicity might so taint the potential jury pool that changes of venue would be inevitable.

Situations are also readily forseeable where one potential juror would have personal information about witnesses or the case which might prejudice other jurors. If this information were revealed to other jurors in open voir dire or through newspaper reports unnecessary exclusion would result making jury selection even more difficult.

The above examples are related simply to note that circumstances exist during voir dire which could require limited closure. As in situations arising during the evidentiary portion of the trial, closure should be done on

a case by case basis. The factors that should be weighed in the balancing process are the interests of the defendant, the state and the public/press. An opportunity to be heard should be available to all parties. Alternative methods to avoid closure should be sought and any closure should be as limited as possible while still protecting the interests involved. Finally, any closure should be supported by articulated findings stating the overriding interest that requires the press and public be excluded.

II

TRANSCRIPTS OF CLOSED VOIR DIRE PROCEEDINGS SHOULD BE MADE PUBLIC WHEN THE REASON FOR CLOSURE NO LONGER OUTWEIGHS OTHER INTERESTS

Since limited situations exist where voir dire proceedings are closed

to the public the question arises as to when the record should be made public.

Transcripts of voir dire proceedings closed to the public should be released as soon as possible without compromising the interests which required the closure. The First Amendment rights of the public which may have to give way to other overriding interests are still held on the balance beam and when the weight of the interest on the other side diminishes the balance tilts in favor of the public's rights. Indeed, this Court noted in Gannet Co. that one reason closure was proper was because the denial of access was not absolute. A transcript of the proceedings was made available once the danger of prejudice had dissipated. (Gannet Co. v. DePasquale, supra, 443 U.S. at p. 393.)

In the context of voir dire proceedings, if the reasons for closure involve maintaining the integrity of the jury panel, the transcripts should generally be released when the jury is impaneled or, at the latest, the conclusion of trial. The possibility exists, however, that in rare instances the interests involved may require that portions of a closed proceeding not be released to the public. In Globe this Court, in acknowledging the possibility that portions of a trial could be closed if strict standards were met, noted that a decision to release some such transcripts would be illogical and lack common sense. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 259.) Obviously, if a reason for closure is compelling and overrides the other interests involved

the test must be continued into the future where challenges may be raised when circumstances change. For example, under the facts of Globe, the state's compelling interest in safeguarding the physical and psychological well being of minors who had been sexually abused would cease once the minors' well-being would no longer be affected by release of the information. The balancing factors set forth, supra, would continue to weigh.

Furthermore, additional interests would have to be considered. While a portion of the transcript of a criminal trial might be denied to the public in general, it would be necessary for the review of the criminal proceedings that the reviewing court and counsel for the parties be allowed access to all portions of the trial.

In instances where portions of a transcript should not be released or release should be restricted because of an overriding interest, the trial court should articulate both the specific restrictions on release and the findings supporting those restrictions at time the proceedings are ordered closed to the public.

In this case, the trial court's orders closing the majority of voir dire and denying public access to the transcripts were overbroad. Absent articulated findings on the record no justification is stated for denying public access to all of the transcript of the closed voir dire proceedings.

On the other hand, our partial review of the transcript of the closed voir dire proceedings gives rise to the belief there is a possibility that a

limited closure was proper. In light of that, amicus urges that the proper remedy is a remand to the trial court to order the entire transcript released, or as much of it as possible, excepting from release only such portions as where the trial court can provide articulated findings justifying closure.

CONCLUSION

The importance of open trials requires that any closure of voir dire in criminal proceedings be as limited as possible. The balancing of the interests involved is a continuing process and

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transcripts of closed proceedings should be made public when the reasons for closure no longer exist.

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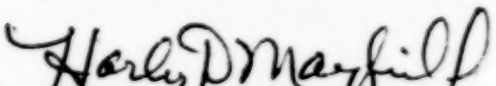

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